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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1952

No. 135

L. C. PARKER,

PETITIONER,

vs.

STATE OF NORTH CAROLINA,

RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, L. C. Parker, seeks by Writ of Certiorari to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Johnston County, North Carolina, imposing sentence upon the Petitioner based upon a conviction of the offense of unlawful possession, for the purpose of sale, of 96 gallons of alcoholic liquors upon which taxes due the United States Government and the State of North Carolina had not been paid. The opinion of the Supreme Court of North Carolina was filed on March 19th, 1952 and is reported as STATE v. L. C. PARKER, 235 N. C. 302. (See Appendix, page 13 where opinion of Supreme Court of North Carolina is set out in full).

FACTS

The defendant was arrested on January 21, 1951 on a warrant issuing out of the Recorder's Court of Johnston County, North Carolina. The warrant was issued on the 20th day of January, 1951 and charged the defendant with the following two offenses: (1) Having in his possession a complete distillery for the manufacture of whiskey; (2) having in his possession 96 gallons of whiskey on which the tax imposed by the State of North Carolina and the tax imposed by the United States had not been paid. When the case was called for trial in the Recorder's Court, the defendant demanded a jury trial which worked a continuance of the case in that court. Thereafter the defendant was indicted in the Superior Court of Johnston County on the 14th day of Februray, 1951 in two separate bills of indictment, each bill containing two counts: (1A) Charged the defendant with conspiracy with one Elmo Allen to possess nontax-paid liquor; (2A) with unlawful possession of nontax-paid liquor; (1B) unlawful possession of nontax-paid liquor for the purpose of sale; (2B) unlawful transportation of nontax-paid liquor upon a motor vehicle. (Record, first appeal, pages 2, 3, and 4). The action was tried at the regular February, 1951 term of the Superior Court for Johnston County before his Honor, William T. Hatch, Judge presiding and a jury.

The defendant was convicted on three of the four counts as follows: (1) Conspiracy with Elmo Allen to possess nontax-paid liquor; (2) possession of nontax-paid liquor; (3) possession of nontax-paid liquor for the purpose of sale. He was acquitted on the count of unlawful transportation.

From said conviction the defendant appealed to the Supreme Court of North Carolina. As to the first count on which the defendant was convicted, the Supreme Court of North Carolina held that there was not sufficient evidence to go to the jury and therefore reversed the conviction as to conspiracy. As to the second count of possession of nontax-paid liquor, the Supreme Court held that since the Recorder's Court of Johnston County had concurrent jurisdiction with the Superior Court and had first exercised that jurisdiction, the case should be sent back to the Recorder's Court for

further proceedings there. As to the third count, the Supreme Court held that the evidence was sufficient to sustain the conviction but that since the sentence was to run concurrently with the sentence on the first count, the case must go back to the Superior Court of Johnston County for a new sentence on that one count. The opinion of the Supreme Court of North Carolina was filed on October 10th, 1951 and is reported as STATE v. L. C. PARKER, 234 N. C. 236, (see Appendix, page 14, where opinion of Supreme Court of North Carolina is set out in full).

In accordance with the decision and opinion of the Supreme Court of North Carolina (STATE v. PARKER, 234 N. C. 236), the defendant was placed on trial in the Recorder's Court of Johnston County on the charge of unlawful possession of 96 gallons of nontax-paid liquor and was acquitted by the jury (Record, second appeal, page 5). This occurred on November 29th, 1951. Thereafter and at the December, 1951 term of the Superior Court for Johnston County, presided over by the Honorable Susie Sharp, the Solicitor for the State moved the court to pass sentence on the defendant on the third count on which he had been convicted at the February, 1951 term. (Record, second appeal, page 3). Whereupon, the defendant moved to set aside the verdict rendered at the February, 1951 term for the following reasons: (a) As being contrary to the law; (b) on grounds of newly discovered evidence. (Record, second appeal, page 3). In support of his motion, the defendant offered the following evidence: (1) The warrant issuing out of Recorder's Court under date of January 20th, 1951 (Record, second appeal, page 3); (2) the minute docket showing the verdict and judgment of acquittal in the Recorder's Court on November 29th, 1951 (Record, second appeal, pages 4 and 5); (3) the bills of indictment in the Superior Court, February, 1951 Term (Record, second appeal, pages 5, 6 and 7); the plea, verdict and judgment at the February, 1951 term; (Record, second appeal, pages 7 and 8; (5) the testimony of B. A. Henry, Sheriff of Johnston County; (Record, second appeal, page 8); (6) the testimony of Earl Parker (Record, second appeal, pages 9, 10, 11, 12 and 13).

Thereupon, the court pronounced judgment as appears in the record. (Record, second appeal, page 14).

After judgment had been pronounced, the defendant moved in arrest of judgment, on the grounds of former acquittal and that the judgment be set aside on the grounds of former acquittal as to the count of possession for the purpose of sale. Motion overruled. The defendant excepted and appealed to the Supreme Court of North Carolina. (Record, second appeal, page 14).

ARGUMENT

I.

THE DENIAL OF PETITIONER'S PLEA OF FORMER ACQUITTAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L. ed. 314
WILSON v. COOK, 327 U. S. 474, 90 L. ed. 793
LOUISIANA v. RESWEHR,, 329 U. S. 459, 91 L. ed. 422

The Petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

U. S. v. RAGEN, (1950; C.C.A. 7), 181 F. (2d) 1001
AMRINE v. TINES, (1942; C.C.A. 10), 131 F. (2d) 827
Compare: PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288

MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597

In U. S. v. RAGEN, *supra*, it is said, at p. 1003:

"The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '*** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States. PALKO v. STATE OF CONNECTICUT, 302 U. S. 319, 58 S.Ct. 149, 82 L. Ed. 288; PHILLIPS v. McCAULEY, 9 Cir., 92 F. 2d 790.

* * * * * *

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In PALKO v. STATE OF CONNECTICUT, 302 U. S. 319, 323, 58 S.Ct. 149, 151, 82 L. Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra*, it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Sixth Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court, the Petitioner's plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the Petitioner was not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a State Court with respect to a question arising under the Constitution of the State. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304, 62 L. ed. 304
DAVIS v. OHIO, 241 U. S. 565, 60 L. ed. 1172
GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917

II.

UNDER THE NORTH CAROLINA STATE LAW THE PLEA OF FORMER ACQUITTAL IS NOT GOOD UNDER THE CIRCUMSTANCES OF THIS CASE.

In the first place it is to be noted that the conviction which the defendant seeks to have reversed was at the February, 1951 Term of the Superior Court of Johnston County, while the plea of former acquittal is based upon the verdict of a jury in the Recorder's Court on November 29, 1951.

In the case of STATE v. JESSE, a slave, 20 NC 95, at page 99, the great Chief Justice Ruffin in discussing the matter of FORMER ACQUITTAL, said:

> "Two species of offenses may have several circumstances in common, but to constitute either offense some other circumstance is to be added; and that may be a circumstance peculiar to each, and when added as a fact alleged in the record, constitutes each offense a different one from the other."

In the instant case, the offense, for which the defendant was acquitted in November, 1951, was the unlawful possession of nontax-paid liquor, while the offense, for which he was convicted in February, 1951, is the offense of unlawful possession of nontax-paid liquor FOR THE PURPOSE OF SALE.

In STATE v. NASH, 86 NC 650, RUFFIN, J., for the court said:

> "To support a plea of FORMER ACQUITTAL it is not sufficient that the two prosecutions should grow out of the same transaction; but they must be for the same offense; THE SAME, BOTH IN FACT AND IN LAW. See Note to 1 BENNETT & HEARD'S leading criminal cases, 522.
>
> "In the principal case of REX v. VANDERCOMB, 516, there referred to, and which was argued as stated by Mr. Justice Buller before all the Judges of England, it was held that unless the first indictment were such as that the defendant might have been convicted upon it by proof of the facts contained in the second, then an acquittal on the former can be no bar to a prosecution for the latter."

Later in the same decision the court said:

> "The only safe rule is to stand by the decisions of our courts, and to hold that the plea of FORMER ACQUITTAL cannot avail, unless there should be an exact and complete identity in the two offenses charged."

In the recent case of STATE v. LIPPARD, 223 NC 167, we find the following:

> "In enumerating certain principles applicable to a plea of double jeopardy, Allen, J., in STATE v. FREEMAN, 162 N. C. 594, 77 SE 780, states: '(1) That a person cannot be tried twice for the same offense; (2) That the offenses are not the same if, upon the trial of one, proof of an additional fact is required, which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to be proven in the trial of each'."

In the instant case, the offense on which the defendant was acquitted was the unlawful possession of nontax-paid liquor. He relies on this acquittal as a legal reason for the pro-

position that the court was without power to pronounce judgment in the case in which the defendant had previously been convicted for the offense of unlawful possession of nontax-paid liquor FOR THE PURPOSE OF SALE. In STATE v. FREEMAN, 162 NC 594 (at page 597) we find the following:

> "In order to support a plea of former acquittal, it is not always sufficient that the two prosecutions shall grow out of the same transaction; but they must be for the same offense, the same both in law and fact, citing STATE v. NASH, *supra*."

In STATE v. MALPASS, 189 NC 349 (at p. 355) we find the following:

> "If two statutes are violated, even by a single act, and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute. STATE v. STEVENS, 114 NC 873; STATE v. ROBINSON, 116 NC 1046. To the same effect: STATE v. HANKINS, 136 NC 621."

In STATE v. DAVIS, 223 NC 54 (at p. 56) the court said:

> "In STATE v. HARRISON, 184 NC 762, 114 SE 830, it was held that a conviction under the Volstead Act was no bar to a prosecution for violating a state statute, though the two indictments were founded on identically the same state of facts. There the violations were of different laws. Here the charge includes not only the same but also other laws. The plea of former jeopardy to be good must be grounded on the 'same offense' both in law and in fact."

In STATE v. WEST, 229 NC 415, Chief Justice Stacy for the court said:

> "The plea of former jeopardy to be good must be grounded on the 'same offense' both in law and in fact. STATE v. HANKINS, 136 NC 621, 48 SE 593; STATE v. TAYLOR, 133 NC 755, 46 SE 5; STATE v. NASH, 86 NC 650. Here there is a difference, both in law and in fact, between the former charge of manslaughter and the present indictment (for hit and run driving). STATE v.

MIDGETT, 214 NC 107, 198 SE 613; STATE v. MALPASS, 189 NC 349, 127 SE 248. Hence the trial court was justified in holding as a matter of law that the defendant's plea could not be sustained."

In 48 C.J.S. (intoxicating liquors), Section 235, page 368, we find the following:

"Under various statutory provisions prohibiting or regulating liquor traffic, different illegal acts arising in or growing out of, the manufacture, sale, and handling of intoxicating liquor, and the ownership or handling of apparatus designed for the illegal manufacture thereof, CONSTITUTE SEPARATE AND DISTINCT OFFENSES. Accordingly it has generally been held that the offense of unlawfully possessing liquor is a distinct offense from that of possession, intent to sell, keeping a place for the sale of liquor, maintaining a liquor nuisance, possessing a still, or manufacture, selling or transporting intoxicating liquor."

Citing COMMONWEALTH v. POLOUS, 246 SW 799, 197 Ky. 280; HENSON v. STATE, 280 SW 592, 103 Texas Cr. 123. Again in the same section we find:

"The offense of selling intoxicating liquor is a separate and distinct crime from that of possessing liquor FOR UNLAWFUL SALE OR DISPOSAL, or keeping a place for unlawful sale or manufacturing or transporting liquor. As is discussed supra in Section 224, a person may be convicted of being a common seller of liquors, and also of the same several sales which were relied on to prove the former offense . . . The same unlawful act may expose the offender to punishment under Federal law and under State statutes." (Emphasis added). Cited various jurisdictions including the Supreme Court of the United States and STATE v. HALL, 224 NC 314.

In AMERICAN JURISPRUDENCE (intoxicating liquors), Section 409, page 472, we find:

"As is elsewhere seen, a single act may constitute two or more distinct and separate offenses, for each of which a person may be punished. . . . In like manner it has been held that a conviction for unlawfully possessing intoxicating liquors does not bar a second prosecution of the defendant for feloniously making or distilling the

same liquor, and also that the fact a person sells the liquor he possesses does not necessarily render the possession and sale a single offense so as to preclude punishing each act." Citing GORDON v. STATE, 127 Miss. 398, 90 So. 95, 18 A.L.R. 1150; ALBRECHT v. UNITED STATES, 273 U.S. 1, 71 L. Ed. 505.

III.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the Petition for writ of certiorari are not Federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the Petition, for the Petitioner failed to set up any of these questions as questions arising under the Constitution of the United States in the State Courts.

Examination of the record will show that although the Petitioner took exceptions to the failure of the trial court to sustain defendant's motion to set the verdict aside on the grounds of former acquittal (Record, second appeal, pages 14 and 15), and to the court's failure to sustain defendant's motion in arrest of judgment on the ground of former acquittal (Record, second appeal, page 15), he failed entirely to set up specially any rights, privileges or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (Appendix page 13) treats the exceptions taken by the Petitioner as raising questions of State law only. In the opinion of the Supreme Court of North Carolina we find the following:

> "Defendant, however, moved in arrest of judgment and interposed plea of former jeopardy on the ground that subsequent to defendant's conviction in the Superior Court he was acquitted in the Recorder's Court of

> the charge of possession of intoxicating liquor. His motion was denied and plea overruled, and properly so, we think, for the reasons set out in the opinion in the former appeal. STATE v. PARKER, *supra;* STATE v. LIPPARD, 223 N. C. 167, 25 S.E. 2d 594. See also STATE v. BELL, 205 N. C. 225, 171 S.E. 50."

In his brief filed in this court, Petitioner argues that the Supreme Court of North Carolina could not have rendered judgment sustaining the Superior Court without deciding that the Petitioner was not twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and cites HONEYMAN v. HANAN, 300 U. S. 14, 81 L. Ed. 476, in which this court said:

> "It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

It is respectfully submitted that the question of former jeopardy under the Fourteenth and Fifth Amendments to the Constitution of the United States was neither raised nor decided in either the Superior Court of Johnston County or in the Supreme Court of North Carolina. The Petitioner's only contention is that the question was impliedly raised and that such question arises from the record itself. The Supreme Court of North Carolina certainly did not know that it was passing upon a question involving the Fourteenth and Fifth Amendments to the Constitution of the United States and did not pass upon any such question at all. Article 1, Section 17, of the Constitution of North Carolina is in the following language:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property, but by the law of the land."

The Supreme Court of North Carolina, in its second opinion (STATE v. L. C. PARKER, 235 N. C. 302), evidently had in mind the foregoing provision of the State Constitution but did not base its decision upon the Fifth and Fourteenth

Amendments to the Constitution of the United States.

Under the statute authorizing review by certiorari of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed." 28 U.S.C. Sec. 1257(3).

The rights, privileges or immunities must be set up in the State courts. BROOKS v. MISSOURI, 124 U. S. 394, 31 L. Ed. 454; HARTFORD LIFE INSURANCE COMPANY v. JOHNSON, 249 U. S. 490, 63 L. Ed. 722.

CONCLUSION

The questions set out in the Petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United State Supreme Court. None of these questions were set up in the State Courts as questions arising under the Constitution of the United States. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

HARRY McMULLAN
Attorney General

CLAUDE L. LOVE
Assistant Attorney General,
Counsel for the State of
North Carolina, Respondent.

APPENDIX

STATE v. L. C. PARKER, 235 N. C. 302
(Filed 19 March, 1952.)

Appeal by defendant from Sharp, Special Judge, December Term, 1951 of Johnston, Affirmed.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

J. R. Barefoot and E. Reamuel Temple for defendant, appellant.

Devin, C. J. On defendant's former appeal in this case (S. v. PARKER, 234 N. C. 236, ... S.E. 2d .....), his conviction on the charge of possession of intoxicating liquor for the purpose of sale was upheld by this Court and the case remanded to the Superior Court "to the end that proper judgment be entered in accordance with this opinion." Judgment has now been rendered within the terms of the statute and in accordance with the decision of this Court. From this no appeal would lie.

Defendant, however, moved in arrest of judgment and interposed plea of former jeopardy, on the ground that subsequent to defendant's conviction in the Superior Court he was acquitted in the Recorder's Court of the charge of possession of intoxicating liquor. His motion was denied and plea overruled, and properly so, we think, for the reasons set out in the opinion in the former appeal. S. v. PARKER, *supra;* S. v. LIPPARD, 223 N. C. 167, 25 S.E. 2d 594. See also S. v. BELL, 205 N. C. 225, 171 S.E. 50.

Defendant's motion for new trial for newly discovered evidence was presented to the court below and was denied in the court's discretion. Abuse of discretion is not suggested. No question is presented for our decision. S. v. LEA, 203 N. C. 316, 166 S. E. 292.

The judgment imposing sentence is

Affirmed.

STATE v. L. C. PARKER, 234 N. C. 236
(Filed 10 October, 1951.)

Appeal by defendant from Hatch, Special Judge, at Regular February Term, 1951, of Johnston.

Criminal prosecutions upon two bills of indictment, each containing two counts, returned by grand jury at February Term, 1951, of Superior Court of Johnston County, charging that on 20 January, 1951, defendant unlawfully and willfully (1) did combine, conspire and confederate with one Elmo Allen to unlawfully possess intoxicating liquor upon which taxes due the United States Government and the State of North Carolina had not been paid; (2) have and possess ninety-six gallons of intoxicating liquor upon which taxes due the State of North Carolina and United States Government had not been paid; (3) did have and possess alcoholic liquors upon which taxes due the United States Government and the State of North Carolina had not been paid, for the purpose of sale; and (4) at divers other times prior thereto, transport upon a motor vehicle intoxicating liquors upon which taxes due the State of North Carolina and United States Government had not been paid, to all of which defendant pleaded not guilty.

However, upon the call of the case in Superior Court on Friday, 16 February, 1951, and before pleading, defendant moved for continuance for the term upon two grounds: (1) The bill of indictment having been returned on Wednesday, 14 February, 1951, and defendant having been arrested around 3 p.m., same day, and kept in custody until court adjourned, he had not had sufficient time to prepare his defense; and there were two material witnesses, naming them, who were absent, and for whom subpoena had been issued and returned by the officer showing that they were "not to be found in Johnston County"; and (2) the solicitor, in opposing defendant's motion for continuance, had made prejudicial statement in the presence of prospective jurors. The motions were denied—and defendant excepted.

Defendant then moved to quash the bill of indictment, in so far as the charge preferred against him in Recorder's Court of Johnston County on 20 January, 1951, as shown by war-

rant then issued out of said court, covers the charges in Superior Court. In support thereof defendant offered as evidence the two bills of indictments on which the prosecution rests, as hereinabove described, and the warrants so issued by the Recorder's Court. The charge in the warrant is possession on 20 January, 1951, of "A complete distillery for the manufacture of whiskey," and of "96 gallons of whiskey on which the tax imposed by the State of North Carolina and the tax imposed by the United States had not been paid." In addition thereto, defendant proposed to show by the sheriff the identity of the charge in the warrant and of like charge in the bills of indictment. Objection by the State was sustained.

In this connection the record shows that warrant for defendant was issued out of Recorder's Court on 20 January, 1951, upon affidavit of one of the officers taking part in the seizure of the intoxicating liquor here involved, and on 21 January, 1951, defendant was arrested by same officer under the warrant and placed in jail and kept there until he gave bond. Later he moved in the Recorder's Court for a jury trial. And it is admitted that, therefore, the charges contained in the warrant have not been tried or disposed of.

Motion to quash was denied and defendant excepted.

Upon the trial in Superior Court the State offered evidence tending to show substantially this narrative: Defendant, L. C. Parker, lives in Raleigh, but has a farm about 20 miles away in Cleveland Township, Johnston County, on which he has a tenant house in which Elmo Allen lives. The basement to this house is of cement blocks.

On 20 January last, and about 10:30 o'clock a.m., officers of Johnston County, and a patrolman, went to said place of defendant. Elmo Allen and his wife were there but defendant was not. The officers walked around the house with Elmo Allen, and seeing black builder's paper over the basement windows, one of the officers asked what was in the basement, and "he said he didn't know, that he was not permitted in that part of the building and didn't have a key." As a result of the conversation, a search warrant was obtained. Allen still contended that he did not have a key.

In the basement the officers found sixteen cases of liquor—

whiskey, in half-gallon jars—twelve jars to the case, making a total of 96 gallons. The cases were stacked against the windows,—four cases high. There was nothing on the jars to indicate that the tax had been paid. In the basement there was "some hog-feed" and "cement."

Elmo Allen talked with the officers,—and was arrested and taken to jail.

Defendant was arrested that night in Smithfield when he came down with a bondsman for Elmo Allen. He was put in jail also. He told the sheriff that one of the keys he had fitted the lock on the basement. The sheriff went that night to the home of Elmo Allen to see if the key fitted. He saw about 75 to 100 bags of cement in the basement. The next day defendant told the sheriff that "he was the only one who had a key to the basement." He made no statement to the officers about the whiskey.

Also upon the trial Elmo Allen, as witness for the State, testified in pertinent part: "I was at home the night . . . the whiskey was found in the basement of the house I lived in. The whiskey was Mr. Leon's . . . Hoover and Earl Parker made the whiskey out of sugar. They brought it there on Friday night on a pick-up truck at about midnight. Leon Parker was there . . . There is no door leading from upstairs to the basement,—the door being on the ground level, and I am not allowed in there unless he is there to open it. Mr. Leon had the key to the basement. I never had a key and had no right to go in . . . For the last two years whiskey belonging to L. C. Parker has been placed in the basement. I have helped put whiskey in that basement on several occasions . . . I would say 10 or 12 times—that whiskey belonged to L. C. Parker."

Defendant, on the other hand, testifying as a witness for himself, denied in all material aspects the testimony offered by the State, particularly that of the witness Elmo Allen, and denied that he owned, or had knowledge of the ninety-six gallons of intoxicating liquor found by the officers in the basement of his tenant's house. He testified that Elmo Allen used the basement for various purposes, in the operation of the farm, and had a key to the door through which the base-

ment was entered; that he, the defendant, stored cement in the basement,—cement he used in his construction work; and that he used the key he had, in going in and out of the basement to put cement in, and to take it out.

Defendant also offered testimony of several witnesses tending to support his testimony.

The case was submitted to the jury.

Verdict: Guilty on all but one count. Not guilty as to transporting.

Judgment: That defendant be confined in the common jail of Johnston County to be assigned to work the roads under the supervision of the State Highway and Public Works Commission as follows: First Count: For a period of twelve months; Second Count: For a period of twelve months, to begin at the expiration of sentence in the first count, suspended for a period of five years, and defendant placed on probation five years upon condition that he pay a fine of $2,500.00 and costs; and Third Count: For a period of twelve months, to run concurrently with the first count.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

E. R. Temple and J. R. Barefoot for defendant, appellant.

Winborne, J. Decision on the assignments of error brought forward in the brief of appellant requires express consideration of these questions:

1. Defendant's challenge to the ruling of the trial judge in denying his motion for a continuance at the February Term, 1951, on the grounds stated, is not well taken.

Our decisions are to the effect that this is a matter addressed to the discretion of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable. And on the facts presented on this record, we are of opinion that no such abuse has been made to appear. See, among many others, these cases: S. v. RILEY, 188 N. C. 72, 123 S.E. 303; S. v. LEA, 203 N. C. 13, 164 S.E. 737; S. v. BANKS, 204 N. C. 233, 167 S.E. 851; S. v. GIBSON, 229 N. C. 497, 50 S. E. 2d 520.

2. The ruling of the court, on defendant's plea in abatement,

erroneously designated "Motion to quash the bill of indictment" (S. v. SHEMWELL, 180 N. C. 718, 104 S.E. 885), as to the count (the second) charging unlawful possession of ninety-six gallons of intoxicating liquor on which taxes had not been paid, is questioned, and properly so, we hold.

The ground on which the plea is based is that the offense charged in this count is one over which the Recorder's Court of Johnston County had concurrent jurisdiction, and over which it had exercised jurisdiction prior to the finding of the bill of indictment in Superior Court.

In this connection, attention is directed to the Act of General Assembly of North Carolina, Public-Local Laws 1911, Chapter 269, by which the Recorder's Court of Johnston County was created. Section 6 of this act, in pertinent part, reads as follows: "Said court shall have all jurisdiction and power in all criminal cases arising in said county which are now or may hereafter be given to justices of the peace, and in addition to the jurisdiction conferred by this section, shall have concurrent original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law, and the same are hereby declared to be petty misdemeanors . . ."

Such being the case, the provisions of G. S. 7-64 are inapplicable in that this section of the General Statutes divests inferior courts of exclusive jurisdiction of certain criminal actions and declares that their jurisdiction of such actions shall be concurrent with Superior Court, and exercised by the court first taking cognizance thereof. S. v. REAVIS, 228 N. C. 18, 44 S.E. 2d 354.

However, decisions of this Court are uniform in holding that where two courts have concurrent jurisdiction of a case, the court which first acquires jurisdiction over the case retains it to the exclusion of the other court. CHILDS v. MARTIN, 69 N. C. 126; in re SCHENCK, 74 N. C. 607; HAYWOOD v. HAYWOOD, 79 N. C. 42; YOUNG v. ROLLINS, 85 N. C. 485; S. v. WILLIFORD, 91 N. C. 529; WORTH v. BANK, 121 N. C. 343, 28 S.E. 488; HAMBLEY v. WHITE, 192 N. C. 31, 135 S.E. 626; ALLEN v. INS. CO., 213 N. C. 586, 197 S.E. 200; see also McIntosh, N.C.P.&P., p. 62.

In CHILDS v. MARTIN, *supra,* and in others of the cases cited, the principle is expressed in this quotation: "The rule is where there are courts of equal and concurrent jurisdiction the court possesses the case in which jurisdiction first attaches." MERRILL v. LAKE, 16 Ohio 673.

And in S. v. WILLIFORD, *supra,* this Court in opinion by Ashe, J., said: "Where the jurisdiction is concurrent, it would seem that either court may take jurisdiction, and when no objection by plea in abatement is made to the jurisdiction, it may proceed to judgment; and such judgment may be pleaded in bar of the prosecution in the other court."

But in the instant case plea in abatement is made in Superior Court to the count in question. Hence it is without jurisdiction to proceed to judgment thereon, and its judgment would not be a bar to further prosecution in the Recorder's Court for same offense. See S. v. TISDALE, 19 N. C. 159; S. v. CASEY, 44 N. C. 209; S. v. WILLIFORD, *supra;* S. v. ROBERTS, 98 N. C. 756, 3 S.E. 682; compare S. v. BOWERS, 94 N. C. 910.

In the case of S. v. ROBERTS, *supra,* the Court said: "It is settled that although a party may be indicted for a criminal offense in a court having jurisdiction of it, yet if pending that indictment, and before being held to answer thereto, he shall be indicted and convicted of the same offense in another court having concurrent jurisdiction thereof, he may plead as a defense to the first indictment such former conviction and have his plea sustained."

But in the present case the Recorder's Court had issued warrant for defendant, and he had been held to answer the charge in that court, before the bill of indictment was obtained in Superior Court. Therefore, defendant's plea in abatement as to the second count in the bill of indictment on which he was indicted in Superior Court should have been sustained.

3. Appellant assigns as error the ruling of the court in denying his motion for judgment as of nonsuit on all counts, and particularly as to the count charging conspiracy. Taking the evidence in the light most favorable to the State, we are of opinion and hold that the evidence is insufficient to take the case to the jury on the conspiracy charge.

"A conspiracy is generally defined to be 'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.'" S. v. DALTON, 168 N. C. 204, 83 S.E. 693. S. v. RITTER, 197 N. C. 113, 147 S.E. 733; S. v. LEA, *supra*, S. v. WHITESIDE, 204 N. C. 710; 169 S.E. 711; S. v. SUMMERLIN, 232 N. C. 333, 60 S.E. 2d 322; MUSE v. MORRISON, ante, 195.

The crime of conspiracy consists of the conspiracy, and not its execution. S. v. YOUNGER, 12 N. C. 357; S. v. RITTER *supra;* S. v. WRENN, 198 N. C. 260, 151 S.E. 261.

And the offense of unlawful conspiracy may be shown by circumstantial evidence. S. v. LEA, *supra*, S. v. WHITESIDE, *supra;* S. v. SUMMERLIN, *supra*. But "when the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt, and exclude any other reasonable hypothesis." S. v. STIWINTER, 211 N. C. 278, 189 S.E. 868, and cases cited. See also S. v. MADDEN, 212 N. C. 56, 192 S.E. 859; S. v. MILLER, 220 N. C. 660, 18 S.E. 2d 143; S. v. GRAHAM, 224 N. C. 347, 30 S.E. 2d 151; S. v. WEBB, 233 N. C. 382, 64 S.E. 2d 268, and cases cited.

4. But as to the third count, charging defendant with the unlawful possession of alcoholic liquors on which taxes had not been paid, for the purpose of sale, the evidence is sufficient to support a verdict of guilty.

The possession of nontax-paid liquor in any quantity anywhere in the State is, without exception, unlawful. G. S. 18-48; S. v. McNEILL, 225 N. C. 560, 35 S.E. 2d 629; S. v. BARNHARDT, 230 N. C. 223, 52 S.E. 2d 904.

Possession of liquor by any person not legally permitted to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of sale. G. S. 18-11, formerly C.S. 3411(j); S. v. GRAHAM, 224 N. C. 347, 30 S.E. 2d 151.

Moreover, possession within the meaning of the above statute, may be either actual or constructive. S. v. LEE, 164 N. C. 533, 80 S.E. 405; S. v. MEYERS, 190 N. C. 239, 129 S.E. 600; S. v. PENRY, 220 N. C. 248, 17 S.E. 2d 4; S. v. WEBB, *supra*.

In the Meyers case, *supra*, it is stated: "If the liquor was within the power of the defendant in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual."

Thus, the evidence tending to show that ninety-six gallons of intoxicating liquor were found in the basement of the tenant house on defendant's farm, and tending to show that he alone had key to the door to the basement, is sufficient to support constructive possession.

Other exceptions directed against the charge, given by the court to the jury, and to failure of the court to charge in accordance with provisions of G. S. 1-180 have been given due consideration and fail to show error for which a new trial should be granted.

But the judgment will be set aside and the case will be remanded to the trial court to the end that proper judgment may be entered in accordance with this opinion. S. v. LEWIS, 226 N. C. 249, 37 S.E. 2d 691; S. v. MALPASS, 226 N. C. 403, 38 S.E. 2d 156; S. v. BRAXTON, 230 N. C. 312, 52 S.E. 2d 895; S. v. CAMEL, 230 N. C. 426, 53 S.E. 2d 313.

Error and remanded.